Treatment by the Courts of Cases Raising VCCR Claims at Trial

Q: How have trial courts addressed Article 36 claims in the cases of death-sentenced Mexican nationals?

A: A review of all such cases since 2003 indicates that:

(1) trial courts are already permitted to consider VCCR violations as part of the totality of the circumstances in evaluating the voluntariness of a confession or *Miranda* waiver; and

(2) these claims are already being extensively litigated at trial.

a) Recent non-*Avena* cases raising an Article 36 claim[1]

In at least 5 recent cases not reviewed by the International Court of Justice in the Avena proceedings, death-sentenced Mexican nationals have raised Article 36 violations before the trial court..

Miranda Guerrero, Víctor (California, sentenced August 4, 2003)[2]

Trial counsel addressed this issue in a motion to dismiss/suppress for VCCR violation. The prosecution stipulated that the police never attempted to comply with the Vienna Convention. The court nevertheless denied the motion.

Camacho Gil, Adrián (California, sentenced February 7, 2006)

Trial counsel asserted a violation of Article 36. A pre-trial motion to preclude the death penalty was denied because the judge found that no such remedy was prescribed by law for a VCCR violation.

Padilla Lozano, Miguel (Pennsylvania, sentenced February 1, 2007)

Court-appointed defense counsel failed to raise the VCCR violation before trial and refused consular assistance. The trial judge repeatedly rebuffed Mexico's efforts to intervene on behalf

[1] While addressing 51 specific cases of Article 36 violations involving Mexican nationals subsequently sentenced to death, the ICJ decision also calls for 'review and reconsideration' in other similar cases of Mexican nationals not addressed by the Court. See *Avena* Judgment, ¶ 153(11) ("should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence...").

[2] The United States successfully objected to Mexico's attempt to add this case to the *Avena* proceedings.

of Mr. Padilla. Mexico later stated in its amicus brief to the Pennsylvania Supreme Court that "the trial court made a series of decisions that effectively prevented Mr. Padilla from receiving the benefits of consular assistance." Both the Article 36 violation and the obstruction of access to consular assistance have been raised on appeal. The case is still pending.

Albarrán Ocampo, Benito (Alabama, sentenced September 3, 2008)

Albarran raised this issue in his motion to suppress his statement to police. Trial counsel argued that he was not given sufficient notice of his right to speak to consular officials from the Mexican Embassy because there were numerous defects in the way he was informed of his consular rights. The trial court denied the motion to suppress, and the appellate court affirmed.[3]

Martínez Mendivil, Carlos (California, sentenced August 21, 2009)

Trial counsel did not raise the VCCR violation in any pre-trial motions and did not contact the consulate for assistance. Mexico's legal assistance program thus did not become involved until shortly before the jury returned with a guilty verdict. Efforts to obtain a continuance prior to the commencement of penalty phase were unsuccessful.

Carreón Martínez, Alberto (Arizona, sentenced April 29, 2003)[4]

The VCCR violation was not raised at trial or on direct appeal; Mexico only learned of the case in November of 2007, by which time it was already in state postconviction proceedings. The claim has been raised in the amended state habeas petition, in the context of ineffective assistance of trial counsel (for failing to seek consular assistance despite awareness of the client's Mexican nationality). No decision has been issued to date.

b) *Avena* cases that raised an Article 36 claim at trial

At least 10 of the *Avena* petitioners raised Article 36 violations with the trial court, primarily in the context of motions to suppress. Here are three representative examples of the trial courts' response.

Juan Sanchez Ramirez

After his arrest, Mr. Sanchez underwent interrogations over a three-day period, during which the authorities did not inform him of his right to contact his consulate. Mr. Sanchez also asserted that he had asked for and was denied a translator throughout his interrogations and that his statement was coerced. After a hearing at which Mexican consular officers testified, the trial court held that it was "speculative" that Mr. Sanchez would have exercised his Miranda rights had he received consular assistance; any violation of his consular rights was therefore not prejudicial.

[3] Albarran v. State, No. CR-07-2147 (Ala. Crim. App. Feb. 25, 2011).

[4] Mexico was not aware of this case at the time of the *Avena* proceedings.

Omar Fuentes Martinez (a.k.a. Luis Aviles de la Cruz)

When jury selection was already underway, Mr. Fuentes informed the court that he would like a continuance of his trial in order to speak to a Mexican consular representative. The judge denied the request for a continuance, commenting that Mr. Fuentes would be free to contact the consulate, but faulting him for not making the request earlier. The defense lawyer, despite his client's explicit request, failed to contact consular officials for assistance.

Ignacio Gomez

At the time of his arrest, Mr. Gómez was carrying his resident alien card, which indicated he was a national of Mexico. The arresting officer admitted he saw this card, but did not inform Mr. Gomez of his rights to consular notification and access. Several months after his initial arrest, Mexican consular authorities learned of Mr. Gómez's detention through his mother. The trial court denied a pre-trial motion to suppress his statement based on the VCCR violation, without comment.[5]

c) Non-capital cases

See United States v. Jorge Breton-Rodriguez, No. CR 05-1424-TUC-RCC (D. Ariz. Aug. 3, 2006) (non-capital federal case granting Mexican national's motion to suppress that also included an Article 36 claim, where defendant had not "knowingly, voluntarily and intelligently waived his rights" when he was interrogated shortly after coming out of a coma, but finding that because "the Court has already suppressed the statement on other grounds, the Court does not feel the need to impose any further remedy for violation of the Vienna Convention").[6] In *United States v. Jorge Breton-Rodriguez* (No. 06-10518, 9th Cir. May 23, 2007)(unpublished), the Court noted that "[b]ecause we uphold the district court's order based on the government's failure to show a valid *Miranda* waiver, we do not reach the Vienna Convention issue").

Q: How have trial and appellate courts addressed timely Article 36 claims in the aftermath of *Sanchez-Llamas v. Oregon* (decided June 28, 2006)?

A: Many courts have now recognized the potential availability of raising "an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police" under *Sanchez-Llamas*, but none have found prejudice sufficient to warrant relief on these grounds.

a) Representative state appellate decisions citing *Sanchez-Llamas*, but finding no prejudice

State v. Banda, 639 S.E.2d 36, n.11 (S.C. 2006) (interpreting *Sanchez-Llamas* as indicating that a defendant "may successfully move for a *Jackson v. Denno* hearing to suppress a statement by

[5] The trial court's denial of the motion to suppress was upheld on appeal, most recently in Gomez v. Quarterman, 529 F. 3d 322, 329-330 (5th Cir. 2008)(summarized *infra* under "Federal appellate court decisions").

[6] Available on-line via Google Scholar, at <http://scholar.google.com>.

asserting a violation of the consular notification provisions of a treaty, along with other factors indicating the involuntariness of a statement").

Anaya-Plasencia v. the State, 642 S.E.2d 401, 404 (Ga. Ct. App. 2007) (defendant's opportunity to cross-examine interrogating detective regarding failure to provide Article 36 advisement falls under "broader challenge" requirements of *Sanchez-Llamas*).

State v. Morales-Mulato, 744 N.W.2d 679, 686 (Minn. Ct. App. 2008) (holding that "suppression is not an appropriate remedy for violation of a foreign detainee's rights under article 36 of the Vienna Convention, but may be considered in assessing whether a statement was voluntary, knowing, and intelligent").

State v. Cabrera, 903 A.2d 427, 431 (N.J. Super. Ct. App. Div. 2006) (observing that *Sanchez-Llamas* "made clear" that a defendant can raise an Article 36 claim as part of a broader challenge to voluntariness).

State v. Alhajjeh, 2010 Ohio 3179, Ohio Ct. App. 8th Dist.) (decided July 8, 2010) (observing that, under *Sanchez-Llamas*, "a defendant can raise a claim that his rights under Article 36 of the Vienna Convention were violated as part of a broader challenge to the voluntariness of his statements to police" but finding that "the trial court properly denied the motion to exclude defendant's statements, based solely upon the alleged violation of his rights under Article 36 of the Vienna Convention").

Sierra v. State, 218 S.W.3d 85, 88 (Tex. Crim. App. 2007) (where Mexican defendant had based his motion to suppress solely on the Article 36 violation, citing *Sanchez-Llamas* in holding that "suppression is not an appropriate remedy for violations of the Vienna Convention," while recognizing that, under the "alternative methods" proposed in *Sanchez-Llamas*, "[o]ur decision does not leave detained foreign nationals without any means of vindicating Vienna Convention rights").

b) Other state appellate decisions not based on *Sanchez-Llamas*

At least two other state appellate courts have recognized the availability of potential post-trial remedies for Article 36 violations, based either on the court's own precedent decisions or by construing the state postconviction statute as encompassing such claims:

Duenas-Flores v. State (Okla. Crim. App., No. C-2005-1, June 28, 2007)(designated not for publication) (vacating judgment and sentence by applying the Court's precedent in *Torres v. State*, 120 P.3d 1184, 1186, and presuming prejudice where defendant "made a showing sufficient for us to conclude that had he been properly advised of his Article 36 rights under the VCCR, he would have opted to proceed to trial rather than plead guilty").

Commonwealth v. Gautreaux, 458 Mass. 741 (Mass. 2011) (recognizing that the *Avena* Judgment's procedural remedy of review and reconsideration is entitled to "respectful consideration" and construing the state's rules on postconviction review as permitting a petitioner "to demonstrate a substantial risk of a miscarriage of justice" by showing that "it is

those rights by requesting consular notification. The consulate may also submit a supporting affidavit declaring that it was not notified of the arrest and would have responded promptly.

- The onus is then on the prosecution to rebut those assertions (e.g., through evidence or testimony claiming that there was no basis for assuming foreign nationality, or by producing a signed waiver of consular notification, a fax confirmation sheet of the consular notification or other documentation establishing compliance).

- Some cases involve the question of when the authorities should have assumed foreign nationality in the absence of indications of foreign identity upon arrest, or in the face of an erroneous assertion of U.S. citizenship. In those cases, the defendant may need to demonstrate that the police should have known or assumed foreign nationality at a given point in the process following the detention.

- In most cases, there is no dispute about the existence of the violation; either the police admit they failed to notify, or they provide documentation of their compliance with the treaty.